

*Wausau's Comments in Response to USEPA's Preliminary Decision of June 2, 1992*

## **EXHIBIT 1**

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September 14, 1992

**VIA FEDERAL EXPRESS**  
**AIRBILL NUMBER 2631107684**

United States Environmental Protection Agency  
Office of Waste Programs Enforcement (OS-510)  
401 M. Street, S.W.  
Washington, D.C. 20460

**Attention: Frederic Zimmerman**

**Re: In Re: Employers Insurance of Wausau,  
Petition for Reimbursement of Costs  
Under 42 U.S.C. Section 9606(b)(2)  
Comments in Response to USEPA's Preliminary Decision of June 2, 1992**

**Dear Mr. Zimmerman:**

## **Introduction**

Please allow this letter and the attached exhibits to serve as the Comments of Employers Insurance of Wausau (Wausau) to the United States Environmental Protection (USEPA) Agency's Headquarters Office (the Agency or Headquarters) Preliminary Decision (PD) dated June 2, 1992, and to the documents and Subject Index cited in the PD. (A copy of the PD is attached hereto and incorporated herein by reference as Exhibit 1.) As stated by the Agency in its letter, the PD was in response to Wausau's Petition for Reimbursement (PR), dated March 22, 1991 (as amended on April 18, 1991) in the Matter of CIW Company Site, Romulus, Michigan. (A copy of the PR, as amended, including the exhibits to the PR, is attached hereto and incorporated herein by reference as Group Exhibit 2.)

This Comment letter further addresses, in part, the Agency's and the USEPA Region V's (the Region) letters of August 5, 1992, but also incorporated herein our letters of September 13, 1992 to the Region and to Headquarters, respectively

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response to the August 5, 1992 USEPA letters. (Copies of the Headquarters and Region letters of August 5, 1992 are attached hereto and incorporated herein by reference as Exhibit 3 and Exhibit 4, respectively.) (Copies of Wausau's September 13, 1992 letters are attached hereto and incorporated herein by reference as Exhibit 5 and Exhibit 6, respectively.) As the Agency stated in its August 5, 1992 letter, the Agency was responding to Wausau's letters of June 18, 1992 and June 25, 1992. (Copies of Wausau's June 18, 1992 and June 25, 1992 letter are attached hereto and incorporated herein by reference as Exhibit 7 and Exhibit 8, respectively.)

Without waiving the Comments set forth herein and in Wausau's letter of September 13, 1992 to the Agency, Wausau acknowledges that the Agency's letter of August 5, 1992 provided Wausau with an additional thirty (30) days from receipt to provide these Comments (which Comments fully incorporate herein the attached Exhibits 1 through 31) (see: Index of Exhibits 1 through 31.) to the Agency. As confirmed with the Agency by our letter dated September 8, 1992, these Comments and the attached exhibits are being submitted and forwarded today, September 14, 1992, by Federal Express to the Agency's Headquarters, and by facsimile transmission (without exhibits) to the Region and also by Federal Express to the Region. (A copy of Wausau's September 8, 1992 letter is attached hereto and incorporated herein by reference as Exhibit 9.)

Preliminarily, Wausau further states that where appropriate and to the extent practicable, these Comments respond to the PD's statements in the order and by using the headings contained in the PD. Also, and as to the statements made by the Agency in the PD to which Wausau deems it appropriate to respond, Wausau uses herein a format that first quotes the Agency or USEPA Statement (citing the PD's page number and paragraph number) and then follows with the responsive Wausau Comment.

11- Wausau submits, however, notwithstanding the Agency's recent June 29, 1992 "Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions" (OSWER Directive Number 9833.5) (hereinafter Guidance on Reimbursement Petitions) which post-dates Wausau's PR, that the Agency was required to timely answer each paragraph of Wausau's PR by clearly and directly admitting, denying or explaining each paragraph contained in the PR, which answer and denial format would have addressed each of Wausau's reimbursement claims and the merits of the PR, and which answers were again requested by Wausau by letter dated July 10, 1992. (A copy of Wausau's July 10, 1992 letter is attached hereto and incorporated by reference as Exhibit 10.)

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Such answers by the Agency would have otherwise obviated many of the Comments set forth herein, but instead of apologizing for the length of these Comments and the number of exhibits incorporated herein, Wausau submits that these Comments, as supplemented by Exhibits 1 through 31, are necessary to fully and completely document the USEPA's "Petition [for Reimbursement] to the Administrative Record, CIW Site, Romulus, Michigan" (AR/PR) as well as the USEPA's other administrative records for the CIW Site. (A copy of the AR/PR as maintained by the USEPA is attached hereto and incorporated herein by reference as Group Exhibit 11.) In addition to the AR/PR, the USEPA also created two administrative records entitled "CERCLA Emergency Program, CIW Romulus Site, Romulus, Michigan" (AR/ERP) and "Removal Action, CIW Romulus Site, Romulus, Michigan" (AR/RA). (Copies of the AR/ERP and AR/RA as maintained by the USEPA are attached hereto and incorporated herein by reference as Group Exhibit 12 and Group Exhibit 13.)

As discussed herein, and as more fully set forth in Wausau's letter of September 13, 1992 to the Agency, Wausau objects to the Region's procedures in creating and maintaining the three administrative records associated with the CIW Site. The Region has systematically excluded relevant, probative information and evidence. The information excluded was both generated and delivered to the Region by Wausau, and in some cases the excluded documentation (e.g. the Office of Regional Counsel's (ORC) file delivered to Wausau on August 20, 1992) was generated by the Region itself. (A copy of the ORC's file as maintained by the Region is attached hereto and incorporated herein by reference as Group Exhibit 14.

Returning to the Agency's PD, the PD's introduction concludes with the Statement:

## USEPA Statement - Page 2, Paragraph 1

"On the basis of the information submitted by the Petitioner and the EPA Region V (Region), EPA is denying [Wausau's] request for reimbursement because Wausau did not meet the statutory threshold requirement for filing a petition set forth in Section 106(b)(2)(A) \* \* \* [and] EPA did not otherwise evaluate the merits of the petition".

## WAUSAU Comment

Simply stated, the Agency's statement is in error and, instead, Wausau submits as set forth in the PR that it complied with the terms of the USEPA's Unilateral Administrative Order (UAO or Order) by completing the actions required by the Order, as further amended by an Emergency Response Action Plan (ERAP) work

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plan submitted by Wausau and approved by the Region. Specifically, Wausau completed the on-Site actions required by the Order, as amended by the ERAP, on January 24, 1991 and, pursuant to the Order and the ERAP, timely submitted a final report, the Response Action Report (dated February 20, 1991), with Wausau's correspondence certifying that Wausau's response and removal action "(i) was substantially in compliance with the requirements under the Order, the ERAP and CERCLA, (ii) was consistent with the National Contingency Plan when evaluated as a whole, (iii) resulted in a CERCLA-quality cleanup, and (iv) that further activities are not required of Wausau at site." The submittal of the RAR, with Wausau's certification letter of February 21, 1991, completed the actions required under the Order as amended by the ERAP. (A copy of Wausau's February 21, 1991 letter is attached hereto and incorporated herein by reference as Exhibit 15. A copy of the RAR (and Appendices) is attached hereto and incorporated herein by reference as Group Exhibit 16. A copy of the Order is incorporated herein by reference in Appendix A of the RAR. A copy of the ERAP is attached hereto and incorporated herein by reference as Exhibit 17.) A copy of the RAR (i. e. the final report required by the Order as amended by the ERAP) was also incorporated in Wausau's PR as an exhibit, and the RAR detailed, as later set forth herein, Wausau's compliance with each provision of the Order as amended by the ERAP.

Moreover, the PR which, again, neither the Agency nor the Region has ever responded to by admitting or denying Wausau's allegations, also alleged and evidenced not only Wausau's compliance with the Order as amended by the ERAP, but also Wausau's meritorious claims for reimbursement of reasonable response costs, including divisible and reasonable response costs, from the Fund based upon Wausau's non-liability or the USEPA's arbitrary and capricious actions, unconstitutional actions, or actions otherwise not in accordance with law. Further evidence of Wausau's compliance with the Order as amended by the ERAP was also submitted by Wausau to the USEPA in its Post Response Action Compliance Comments (PRACC) (dated July 8, 1991), and its Supplemental Post Response Action Compliance Comments (SPRACC) (dated May 22, 1992). (Copies of the PRACC and the SPRACC are attached hereto and incorporated herein by reference as Exhibit 18 and Exhibit 19, respectively.) There is, then, for the reasons set forth in these comments and the exhibits incorporated herein, and notwithstanding the statement quoted above, a "basis of information" which affirmatively evidences that Wausau met the "statutory threshold" for filing a PR and that Wausau's PR is meritorious. The USEPA should, therefore, issue a Final Decision (FD) granting Wausau's Petition for Reimbursement.

Unfortunately, and wrongfully, the USEPA has arbitrarily and capriciously excluded from the AR/PR, and also the AR/ERP and the AR/RA, information and

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documentation submitted by Wausau, and wrongfully not considered relevant information submitted by Wausau in issuing its PD. Similarly, the USEPA has repeatedly failed to include for Wausau's review and comment relevant information in the AR/PR, or the AR/ERP and the AR/RA, that is otherwise generated by USEPA or contained in the Region's ORC file relating to the CIW site. Instead, Wausau submits herein, and as also set forth in its September 13, 1992 Comments to the Agency, that all relevant information considered and relied on or considered and rejected by the Region relating to Wausau's PR and to the CIW site must be included in the AR/PR, the AR/ERP and the AR/RA, whether or not the Agency or the Region considered or relied on the information in support of the Agency's or the Region's decisions. Wausau further submits that the Region's procedures in selecting which information and documentation is included in the administrative records relating to the CIW Site was inconsistent with the National Contingency Plan (NCP), the USEPA's own directives, and otherwise arbitrary and capricious.

## **I. Wausau's Comments To PD's "Review and Appeal Procedure" Section**

The USEPA contends under its PD section entitled "I. Review and Appeal Procedure" that:

### **USEPA Statement - Page 2, Paragraph 2**

"In issuing this preliminary decision, EPA's Office of Waste Programs Enforcement (OWPE) has reviewed the petition and the related documentation submitted by the Petitioner and the Region. \* \* \* When the comments [from the Petitioner and the Region] are received and reviewed, OWPE will issue a final decision."

### **WAUSAU Comment**

As referred to above, the Region has repeatedly denied Wausau's requests to admit relevant information, documentation, correspondence and other evidence in the AR/PR. The Region and the Agency have misinterpreted the NCP and the USEPA's internal directives, by including only documents that purportedly form the basis supporting the Agency's decision. As indicated, the Agency and the Region have repeatedly failed to include relevant information and documentation in the AR/PR generated by the Agency, the Region or their contractors, as well as from Wausau and its contractors and attorneys, that relate to the removal activities at issue, and which do not support the Region's actions or this PD.

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I thought  
city had  
access to  
all documentation  
before providing  
comments

As such, the scope of the PD is unfairly and unlawfully skewed to the extent that its review is based upon an administrative record prepared by the Region or the Agency that only includes evidence that supports the Region's actions and decisions. Furthermore, the scope of these Comments are regrettably affected in that, after several requests for valid, relevant and available documents, reports and other evidence, the Agency and the Region have denied Wausau timely and meaningful access thereto, even though such documents, requests and other evidence is required by the NCP and the USEPA's directives and guidance memorandums to be made available and to be included in the administrative record for review. Wausau is not, therefore, able to comment as fully as it could if all of the available information, documentation and evidence in the possession of the Agency or the Region was made available to it or placed on the AR/PR, or the AR/ERP and the AR/RA.

Also and turning to the Agency's open-ended statement under the Review and Appeal Procedures section that "when the comments [from Wausau and the Region] are received and reviewed, OWPE will issue a final decision", Wausau respectfully requests that a Final Decision be issued by the Agency within thirty (30) days after receipt of these Comments and the attached exhibits.

## II. Wausau's Comments To PD's "Background" Section

As stated by Wausau in the PR and also in the RAR, the PRACC, the SPRACC, and by the Agency in its PD section entitled "II. Background", on November 28, 1989 the USEPA issued a unilateral Order pursuant to Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). CIW Company, K & D Industrial Services, Inc., Group Eight Technology, Inc., and Wausau were named as Respondents to the Order. In addition, a subsequent amendment to the Order named the CIW Site owner, Howard O. Gabbert, Jr., as a Respondent. Wausau first responded in writing to the Order by Comments dated December 29, 1989 under cover of letter dated January 2, 1990. (Copies of the December 29, 1989 Comments, with attachments, and the January 2, 1990 letter are attached hereto and incorporated herein by reference in Appendix B of the RAR.)

As further stated by Wausau in the PR, the RAR, the PRACC, the SPRACC, and by the Agency in its Background section, all Respondents were required by the Order to "complete emergency removal activities at the CIW site to abate a possible imminent and substantial endangerment to the public health and welfare or the environment arising from the actual or threatened release of hazardous substances

[illegible]

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*Short term threat  
vs. ambient  
spring blow-off  
PCBs  
VOCs  
when  
occur*

at the site." As further stated in the PD's Background section, "EPA found a substantial threat of release of hazardous substances, primarily polychlorinated biphenyls (PCBs) and volatile organic compounds (VOCs)." As set forth in the PR, without admitting any of the Findings or Determinations contained in the Order, or any fact, responsibility, fault or liability in connection with the CIW Site, Wausau (and only Wausau) complied with the terms of the Order by performing the actions required by the Order as amended by the ERAP.

*separ  
able  
must  
complete  
work  
TJ  
12/15/89  
1. a liability  
remedy*

According to the Order, the alleged endangerment resulted from the transportation of approximately 700 gallons of PCB-contaminated transformer fluids to the CIW used oil recycling facility on April 15, 1989. As such, Wausau's purported liability under the Order arises from the bulk delivery of transformer fluids on one day, April 15, 1989. Wausau's alleged liability is therefore separable and divisible from conditions existing at the CIW Site before April 15, 1989, including but not limited to hydrocarbon contaminated soils, waste drums, inert materials, waste oils, new commercial products and other non-PCB-contaminated substances.

As stated in the Order, and as also quoted in the PD with respect to Order No. 4, and as further set forth in the PR:

## USEPA Order Nos. 1 and 2 required

- "1. Within five (5) calendar days after the effective date of this Order, the Respondents shall submit to USEPA for approval, a Work Plan for the removal activities ordered as set forth in Paragraph 4 below. The Work Plan shall provide a concise description of the activities to be conducted to comply with the requirements of this Order. The Work Plan shall be reviewed by USEPA, which may approve, disapprove, require revisions, or modify the Work Plan. Respondents shall implement the Work Plan as finally approved by USEPA. Once approved, the Work Plan shall be deemed to be incorporated into and fully enforceable part of this Order.
2. The Work Plan shall contain a site safety and health plan, a sampling and analysis plan, and a schedule of the work to be performed. The site safety and health plan shall be prepared in accordance with the Occupational Safety and Health Administration (OSHA) regulations applicable to Hazardous Waste Operations and Emergency Response, 20 CFR Part 1910. The Work Plan and other submitted documents shall demonstrate that the Respondent can properly conduct the actions required by this Order."



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In response, Wausau complied with the Order by submitting a work plan, entitled an Emergency Response Action Plan (ERAP), which contained a sampling and analysis plan, site safety and health plan and a project schedule descriptive of the work to be performed. The ERAP was submitted by Wausau to the USEPA in accordance with the Order and formal approval was received from the USEPA by letter dated February 26, 1990. (See: Sections 1.1 and 1.2 and Appendix C of the Response Action Report (RAR).)

USEPA Order No. 3 required:

2. Didn't Wausau seek clarification of the ERAP through R5.
- "3. Respondents shall retain a contractor qualified to undertake and complete the requirements of this Order, and shall notify USEPA of the name of such contractor within three (3) days of the effective date of this Order. USEPA retains the right to disapprove of any, or all, of the contractors and/or subcontractors retained by the Respondents. In the event USEPA disapproves of a selected contractor, Respondents shall retain a different contractor to perform the work, and such selection shall be made within two (2) business days following USEPA's disapproval."

In response, Wausau complied with the Order by submitting contractor notification to the USEPA by letters dated February 27, 1990 and May 25, 1990 for Phases I and II, respectively. The USEPA's formal response to the notification was received from the USEPA by letter dated June 7, 1990. (See: Section 1.2 and Appendix C of the RAR.)

USEPA Order No. 4 required:

- "4. Within two (2) calendar days after USEPA approval of the Work Plan, Respondents shall implement the Work Plan as approved or modified by USEPA. Failure of the Respondents to properly implement all aspects of the Work Plan shall be deemed to be a violation of the terms of this Order. The Work Plan shall require the Respondents to perform, and complete within twenty-five (25) calendar days after approval, at a minimum, the following removal activities.

- a. Provide site security and develop and implement a safety plan.
- b. Pump, treat, test, and discharge contaminated water as necessary.

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- c. Pump and consolidate all contaminated oils and incinerate them off site.
- d. Pump out sludges and dispose of them properly.
- e. Excavate contaminated soils and dispose of them properly.
- f. Pump and treat liquids in the dikes on site.
- g. Treat lagoon water and discharge.
- h. Sample, characterize, and dispose of drums of waste on site.
- i. Conduct post cleanup sampling."

In response, Wausau complied with 4.a. of the Order by initiating Site security on February 28, 1990. Further, the Site safety plan as approved by USEPA was implemented in accordance with the USEPA-approved ERAP concurrently with implementation of the response action. (See: Sections 1.2, 2.2.2 and Appendix E of the RAR.)

In further response, Wausau complied with 4.b. of the Order by treating contaminated water on Site with granular activated carbon in accordance with the Order and the ERAP. Final effluent resulting from on-Site treatment was tested and then treated or disposed of at Safety-Kleen (East Chicago, Indiana) in accordance with USEPA authorization by letter dated July 16, 1990. (See: Sections 1.2, 4.3.3 and 4.4.5 and Appendices C, J and Q of the RAR.)

In further response, Wausau complied with 4.c. of the Order by pumping, consolidating and subsequently incinerating contaminated oils at Chemical Waste Management's (CWM) Chemical Services, Inc. (Chicago, Illinois) or Rollins' Environmental Services, Inc. (Deerpark, Texas) incinerators in accordance with the Order, the ERAP and the USEPA authorization by letter dated July 7, 1990. (See: Sections 1.2, 4.4.1 and 4.4.3, Table 2 and Appendices C, J and O of the RAR.)

In further response, Wausau complied with 4.d. of the Order by pumping and/or removing sludges from storage vessels with hand tools and solidifying on Site. Solidified sludges were disposed of at Chemical Waste Management's TSCA-compliant Landfill (Emelle, Alabama) in accordance with the Order, the ERAP and USEPA authorization by letter dated June 7, 1990. (See: Sections 1.2 and 4.5, Table 2 and Appendices C, J and R of the RAR.)

In further response, Wausau complied with 4.e. of the Order by excavating and disposing of contaminated soils (total polychlorinated biphenyl concentrations at, or exceeding, 10 ppm pursuant to the USEPA-approved ERAP) at Chemical Waste Management's TSCA-compliant Landfill (Emelle, Alabama) in accordance with the

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Order, the ERAP and USEPA authorization by letter dated June 7, 1990. (See: Sections 1.2, 4.8.1, 4.8.3 and 4.9 and Appendices C, J and R of the RAR.)

In further response, Wausau complied with 4.f. of the Order as liquids contained within the on-Site dikes were either treated in the same manner as identified under 4.b. (aqueous liquids) or 4.c. (organic phase liquids). Tanks, dikes and structures were either decontaminated or removed in accordance with the Order, the ERAP and with USEPA authorization. (See: Sections 1.2, 4.4.1, 4.4.5, 4.6.1, 4.6.2, 4.7, 4.8.3 and Appendices J, O, Q and R of the RAR.)

In further response, Wausau complied with 4.g. of the Order by sampling and analyzing pond waters from the two ponds located on Site for PCBs in accordance with the Order and the ERAP. Sampling results indicated no detectable levels of PCBs. The ponded water, therefore, did not require treatment and disposal. Sampling results were forwarded to the USEPA by letter dated July 9, 1990. In addition, during the majority of the on-Site Phase II removal activities, surface water was not present in the off-Site lagoon area located immediately east of the on-Site laboratory; therefore, water samples were not collected from the lagoon. However, sediment samples that were collected from the sediment existing at the base of the lagoon did not exhibit detectable PCB concentrations. (See: Sections 1.2, 4.4.5 and 4.8.2 and Appendices C and J of the RAR.)

In further response, Wausau complied with 4.h. of the Order by sampling and characterizing drummed and containerized materials in accordance with the Order and the USEPA-approved ERAP. TSCA and RCRA-characteristic drummed and containerized wastes were disposed of in accordance with federal and state regulations, as authorized by USEPA, at CWM Chemical Services, CWM's Trade Waste Incineration (Sauget, Illinois) incinerator and CWM's Chemical Waste Landfill (Emelle, Alabama). Formal authorization from USEPA was received by letter dated June 7, 1990. (See: Sections 1.2, 3.1, 3.2, 3.3, 3.3.1, 3.3.2, 3.3.3, 4.10, 4.12, 4.12.1, 4.12.2 and 4.12.3 and Appendices C and J of the RAR.)

In further response, Wausau complied with 4.i. of the Order as post-cleanup sampling, in accordance with the Order and the ERAP, was completed following cessation of surface removal activities. (See: Sections 1.2, 4.8.1, 4.8.2 and 4.8.3 and Appendix J of the RAR.)

## USEPA Order No. 5 required:

- "5. All materials containing hazardous substances, pollutants or contaminants removed pursuant to the Order shall be disposed of or

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treated at a facility approved by the On-Scene Coordinator and in accordance with the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. Section 9601, et seq. as amended, the USEPA Revised Off-Site Policy, and all other applicable Federal, State and local requirements."

In response, Wausau complied with the Order by disposing or treating materials containing hazardous substances, pollutants or contaminants at facilities approved by USEPA's On-Scene Coordinator (OSC). (See: Sections 1.2, 4.3.3, 4.4.5, 4.9, 4.10, 4.11, 4.12, 4.12.1, 4.12.2 and 4.12.3 and Appendices C, O, P, Q, R, S and T of the RAR.)

### USEPA Order No. 6 required:

- "6. On or before the effective date of this Order, the Respondents shall designate a Project Coordinator. To the greatest extent possible, the Project Coordinator shall be present on site or readily available during site work. The USEPA has designated P.C. Lall of the Emergency and Enforcement Response Branch, Section 1, as its On-Site Coordinator and the Project Coordinator shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communication between the Respondents and the USEPA, and all documents, reports and approvals, and all other correspondence concerning the activities relevant to this Order, shall be directed through the On-Scene Coordinator and the Project Coordinator."

In response, Wausau complied with the Order by designating a project coordinator within the time frames agreed to by USEPA. Formal notification to the USEPA was provided by letter dated February 27, 1990. (See: Section 1.2 and Appendix C of the RAR.)

The Agency next stated in the Background section of the PD:

### USEPA Statement - Page 3, Paragraph 3 and Page 4, Paragraph 1

"Despite EPA's approval of the Work Plan, Wausau submitted subsequent correspondence which focused on the scope of the removal action. In particular, Wausau informed the Region that it would only remove one of the tanks if told to do so. Wausau further claimed that it was not responsible for any contamination that did not involve PCBs. The Region

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responded by informing Wausau of its obligations under the Order and the process for seeking reimbursement.

The Region also sent Wausau a letter [dated October 11, 1990] clarifying a statement Wausau made about non-PCB oils and non-hazardous waste drums. The letter reminded Wausau of its responsibility to perform the action identified in the Work Plan. Further, the Region informed Wausau, again, that the Order was broadly written to require a response to drums that were uncontaminated with PCB oil because these drums contained RCRA characteristic hazardous wastes".

### WAUSAU Comment

The ERAP was more than simply approved by the Region, it was negotiated within limited time constraints between Wausau and the Region following USEPA's issuance of the Order, which Order Wausau has always contended, and continues to contend, is unconstitutional, arbitrary and capricious, otherwise not in accordance with law, and not applicable to Wausau. From its earliest comments dated December 29, 1989 even before the ERAP was approved, Wausau commented upon the overly broad and unlawful nature of the Order, and the ERAP reflects the Region's approval of limiting the CIW Site removal actions to activities primarily, and almost exclusively, to PCB - contamination and drummed waste materials. Wausau, therefore, submitted correspondence to the Region in response to removal actions requested by the Region which went beyond the requirements of the Order as amended by the USEPA - approved ERAP. Admittedly, Wausau's correspondence also discussed contamination that did not involve PCBs, which non-PCB contamination did not provide the basis for the USEPA's finding in the Order of an alleged "imminent and substantial endangerment."

With regard to the conversation concerning the "one tank" referred to in the USEPA's Statement, Wausau did not inform the Region that it would only remove one tank. At one point in the remediation activities, Wausau encountered PCB-containing oils in a tank adjacent to a tank containing non-PCB contaminated materials. It was cost-effective and more convenient for Wausau to remove both tanks in series, rather than working around the one tank. Wausau, therefore, agreed to remove the one tank that did not contain PCBs if the Agency so requested since the Order as amended by the ERAP did not cover the non-PCB tank in question. Even a cursory review of the RAR discloses that Wausau removed in excess of 20 tanks, all in accordance with the ERAP, and to suggest that Wausau ever attempted to limit its activities to the one tank mentioned in the PD is not well-taken. This unsupported statement in the PD is no evidence that Wausau refused

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to complete the activities in the Order as amended by the ERAP. The actual events surrounding the non-PCB tank is an example of Wausau's consistent compliance with the Order as amended by the ERAP, and is consistent with the law.

The same is true with respect to USEPA's Statement in the PD regarding "non-PCB oils" and "non-hazardous waste drums." Notwithstanding the Region's October 11, 1990 correspondence to Wausau, the Order as amended by the ERAP did not give the Region the authority to order Wausau to remove non-PCB-contaminated oils. (A copy of the Region's October 11, 1990 letter is attached hereto and incorporated herein by reference as Exhibit 20.) Instead, as set forth above and in the PR, and as more fully discussed herein under the Discussion section, the ERAP required PCB-contaminated oils to be analyzed and disposed of. All oils were analyzed for PCBs but, again, no disposal of non-PCB-contaminated oils were required by the ERAP. Also, and by way of but one example, virgin diesel fuel is not "contaminated" oil.

With respect to drummed waste, as also discussed above and in the PR, and under the Discussion section, the ERAP's Site Sampling Plan, consistent with Order No. 4.h., required that all drums of waste be sampled and characterized. Following receipt of characterization data, all drums containing PCB-contaminated material and/or RCRA-characteristic wastes were disposed of in accordance with the Order as amended by the ERAP. Therefore, while the Region's letter of October 11, 1990 takes the view that the Order is broadly written, the USEPA-approved ERAP, as an amendment to the Order, was complied with by Wausau as the ERAP pertained to drummed waste.

The Agency next stated in the Background section:

### USEPA Statement - Page 4, Paragraph 2

"On March 22, 1991, Wausau submitted to EPA its petition seeking reimbursement of its response costs. The petition contained two reimbursement claims: (1) Wausau is not liable under Section 107(a) and (2) EPA's Order was unconstitutional, arbitrary and capricious, or otherwise not in accordance with law. In response, EPA filed a response [dated April 9, 1991] acknowledging receipt of the petition. Approximately one month after Wausau filed the original petition, Wausau filed amendments to the petition on April 18, 1991. The amendments included minor word changes, an increase in the costs sought, and a request for an EPA hearing on the petition".

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## WAUSAU Comment

Wausau's PR, as amended, does claim that Wausau is not liable under Section 107(a) of CERCLA and that the USEPA's Order was unconstitutional, arbitrary and capricious, or otherwise not in accordance with law. Wausau, however, because of the divisibility of these claims as pleaded in the PR has meritorious claims for the reimbursement of reasonable response costs such that the Agency can issue a FD granting, or granting in part, the PR as to certain divisible response costs even if the Agency otherwise finds that other response costs incurred by Wausau are not reimbursable because the Agency determines that Wausau is a liable party or that the Order, as issued or as applied, was not unconstitutional or not arbitrary and capricious.

The Agency continued in the Background section:

## USEPA Statement - Page 4, Paragraph 3; Page 5 - Paragraphs 2, 3 and 4

"After Wausau filed the petition and the amendments, the Region issued a letter [dated June 10, 1991] to Wausau indicating that it did not complete the work required by the Order. The letter fully described the activities needed for completion at the facility. (see discussion below). Finally, the letter indicated that Wausau prematurely filed the petition according to section 106(b). On Tuesday, June 18, 1991, the Region informed Wausau that unless it decided to finish the work, EPA would proceed on June 24, 1991, to complete the work. Nonetheless, the Region indicated that Wausau still questioned whether the Order required the performance of the activities identified in the June 10, 1991, letter, including the removal of the organic hazardous substances. The next day the Region informed Wausau that EPA would finish work at the facility starting June 24, 1991. Wausau informed the Region that its contractors would also appear at the facility. EPA started to finish the remaining work on June 24, 1991.

OWPE issued a letter [dated June 26, 1991] to Wausau confirming the Region's earlier letter that Wausau did not complete the work under the Order. The OWPE letter further determined that Wausau prematurely filed the petition and that OWPE would not evaluate the petition until Wausau completed the required work. Nonetheless, OWPE provided Wausau with the opportunity to demonstrate why it claimed the work was complete.

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Wausau issued a subsequent letter [dated July 3, 1991] acknowledging receipt of OWPE's June 26, 1991, letter. Wausau also indicated that it was preparing a report to show that it completed the required action. The Region also issued a letter [also dated July 3, 1991] to Wausau summarizing the communication that it had recently undertaken with Wausau.

Wausau issued comments [the PRACC dated July 8, 1991] in response to the Region's June 10, 1991, letter indicating that it completed the action required under the Order (see discussion below). The Region responded [on August 9, 1991] to Wausau's comments, again, claiming that Wausau did not complete the work and comply with the Order (see discussion below)."

### WAUSAU Comment

The Agency concludes its PD statements under the Background section with the above-quoted paragraphs. For the most part, a chronology is set out by the Agency beginning with the Region's letter of June 10, 1991. (A copy of the Region's June 10, 1991 letter is attached hereto and incorporated herein by reference as Exhibit 21.) In fact, the June 10, 1991 letter was the first written communication from the Region to Wausau since Wausau's certification letter of February 21, 1991 (Exhibit 15) enclosing the RAR dated February 20, 1991 which completed the CIW Site activities required under the Order as amended by the ERAP and, also, since Wausau filed the PR on March 22, 1991. In fact, in Wausau's view, the Region's June 10, 1991 letter constituted a denial of Wausau's PR and, as the Agency notes, resulted in a complaint being filed in the United States District Court.

The Agency continues with its chronology indicating that on June 18, 1991 that the Region telephoned counsel for Wausau stating that the USEPA would proceed to conduct additional removal activities at the CIW Site unless Wausau remobilized less than one (1) week later, or by June 24, 1991, to conduct the additional activities being requested by the Region, including the removal of non-PCB but hydrocarbon contaminated soils. In response, and as later memorialized in the Region's letter of July 8, 1991 to Wausau, Wausau on June 19, 1991 "offered completion of the cleanup at the site except for the hydrocarbon contamination." (A copy of the Region's July 8, 1991 letter is attached hereto and incorporated herein by reference as Exhibit 22.) As the Agency might understand, Wausau's offer was made to avoid protracted administrative proceedings and litigation, and was not an admission that further removal activities were required under the Order as amended by the ERAP.



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The Agency also cites the letter of July 3, 1991 from the Region to Wausau, but does not include in the PD or the PD's Subject Index a discussion of Wausau's letters of June 18, 1991, June 20, 1991 and June 21, 1991, referred to therein by the Region. (Copies of the Region's July 3, 1991 letter and Wausau's June 18, 1991, June 20, 1991 and June 21, 1991 letters are attached hereto and incorporated herein by reference as Exhibit 23, Exhibit 24, Exhibit 25, and Exhibit 26, respectively.) As addressed elsewhere, but incorporated herein, none of Wausau's letters were included in the AR/PR, even though the Agency's PD Subject Index refers to the letters as "inaccuracies" and the Region cites the letters in a letter that is in the AR/PR. The inaccuracy most objectionable to the Region seemed to be Wausau's view that "clean closure" of the CIW Site -- meaning a restoration of the Site to conditions that pre-existed the Site's commercial development as a used oil recycling facility, including the removal of all contamination attributable to any party-- was not required by the Order as amended by the ERAP.

Next, the Agency's chronology returns to OWPE's (the Agency's) letter of June 26, 1991. (A copy of the Agency's June 26, 1991 letter is attached hereto and incorporated herein by reference as Exhibit 27.) Wausau responded to the June 26, 1992 Agency letter by letter dated July 3, 1991 indicating that Wausau was preparing comments to the Region's June 10, 1991 letter and, thereafter, Wausau subsequently submitted to both the Region and the Agency the PRACC dated July 9, 1991. The PRACC concluded, as did the RAR and as set forth in the PR, that Wausau abated any alleged imminent and substantial endangerment at the CIW Site by completing the response activities required by the Order as amended by the ERAP and, further, that the Region's June 10, 1991 letter addressed removal activities beyond the scope of the Order and the USEPA-approved ERAP.

Next, the chronology contained in the Background section refers to the Region's August 9, 1991 letter to Wausau in response to the PRACC, and the complaint filed in the United States District Court by Wausau on July 9, 1991. (A copy of the Agency's August 9, 1991 letter is attached hereto and incorporated herein by reference as Exhibit 28.) Since the complaint containing Wausau's Section 106(b)(2) claim for reimbursement was pending, Wausau elected not to respond to the Region's letter of August 9, 1991. Following the April 16, 1992 dismissal without prejudice of the Section 106(b)(2) reimbursement claim, Wausau then submitted to the Agency and the Region the SPRACC dated May 22, 1992. Wausau has not received any response from the USEPA regarding the SPRACC which also concluded, as did the RAR and the PRACC that Wausau complied with the Order as amended by the ERAP.

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Finally, the Agency states that the Region "finished the work under the Order on October 25, 1991", citing the Region's April 29, 1992 letter to Headquarters. (A copy of the Region's April 29, 1992 letter is attached hereto and incorporated herein by reference as Exhibit 29.) The Region's April 29, 1992 letter (entitled by the Region as "CIW Site Post-PRP Removal Action Summary") may summarize Fund-financed USEPA removal actions at the CIW Site, but it is not, in Wausau's view, a list of removal actions that were required under the Order as amended by the ERAP.

Moreover, the Region's assertion in its Action Memorandum dated June 18, 1991, as amended on July 9, 1991, that PCB-contamination created an "imminent and substantial endangerment" at the CIW Site is not borne out by the Region's April 29, 1992 letter. (A copy of the Region's Action Memorandum of June 18, 1991, as amended, is attached hereto and incorporated herein by reference as Group Exhibit 30.) Instead, as more fully addressed below, the letter confirms that the PCB-contamination at the CIW Site was abated by Wausau's Order and ERAP compliance actions.

Most telling, however, is the statement in the Region's April 29, 1992 letter that while "characterization of the type and extent of soil contamination... revealed elevated levels of hydrocarbon contamination... the volume of contaminated soil which needed to be removed was beyond the scope of emergency response" and, therefore, no soils were removed by the Region. This statement is entirely consistent with the Order as amended by ERAP, but in contradiction to the Region's prior request to Wausau that Wausau remove hydrocarbon contaminated soil. Again, the only reading of both the Order, and the Order as amended by the ERAP, shows that Wausau was not required to remove hydrocarbon contaminated soil, if any, only PCB-contaminated soils above an action level of 10 mg/kg.

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### III. Wausau's Comments To PD's "Statutory Requirements" Section

As discussed above, the Agency stated in the PD that Wausau had not met the "statutory threshold" requirements, and, as such, USEPA refused to "evaluate the merits of the petition". USEPA stated its understanding of the "statutory threshold" requirements as follows:

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## USEPA Comment - Page 6, Paragraph 2

### **"A. Relevant Statutory Requirements for Filing and Reviewing this Petition**

Section 106(B)(2)(A) of CERCLA states that "any person who receives and complies with the terms of any Order issued under subsection (a)...may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest." To obtain reimbursement, a petitioner must establish by a preponderance of the evidence that it is not liable for the response costs and that the costs for which it seeks reimbursement are reasonable. Alternatively, a petitioner who is liable can recover its reasonable costs if it can demonstrate on the administrative record that the President's decision in selecting the response action was arbitrary and capricious or otherwise not in accordance with law.

### **Threshold Statutory Requirements**

A petitioner must meet several threshold requirements set out in section 106(b) before EPA further evaluates the actual merits of a petition. These threshold requirements are as follows:

- Petitioner received and complied with the terms of an administrative order issued by EPA under CERCLA section 106(a);
- Petitioner completed the required action;
- Petitioner submitted a petition to EPA for reimbursement within 60 days after completing the required action;
- Petitioner incurred costs".

## **WAUSAU Comment regarding Statutory Requirements**

According to the PD and also the Guidance on Reimbursement Petitions which post-dates Wausau's PR, a petitioner seeking reimbursement under CERCLA Section 106(b) must complete the "required" response actions. Thereafter, within sixty (60) days, the petitioner must both file its petition for reimbursement with the Agency, and certify completion to the Region. The Agency then responds by

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acknowledging receipt of the petition pending confirmation of completion from the Region. If the Region responds affirmatively, then the Agency evaluates the petition. If the Region denies confirmation of completion, the matter is held in abeyance pending final completion of the cleanup activities to the satisfaction of the Region. In that event, the process begins again pending the Region's confirmation that the project has been completed to the Region's satisfaction. Furthermore, according to USEPA, the determination of completion is considered by the USEPA to be solely within the purview of the Region, and the Region's determination that the petitioner has not completed the actions, is not considered by the Agency to be a "final" determination.

USEPA's interpretation of this "statutory threshold" requirement, however, effectively reads out an important constitutional safeguard found in the words "without sufficient cause". Inasmuch as CERCLA has significant penalties associated with non-compliance of a unilateral Section 106 Order, a PRP may nonetheless choose to ignore an otherwise unlawful or illegal government Order and avoid the penalties associated with the refusal, provided the party does so "with sufficient cause".

The Agency must interpret the law to provide for judicial review, and to maintain the "sufficient cause" defense. The only correct interpretation of "completion", then, that comports with the Constitution would equate completion as to when the petitioner states, subject to later proofs, that an Order, including any amendments, has been complied with. If the Agency disagrees, the Agency may seek to impose the penalties provided for in the CERCLA statute, and/or deny a petition for reimbursement for failure to "comply" with the terms of the Order.

With respect to the remaining "statutory threshold" requirements, as Wausau has stated herein and in the PR, Wausau received and complied with the terms of the Order as amended by the ERAP, the PR was timely filed, Wausau incurred reasonable response costs, and the required removal actions have been completed at the Site. Nonetheless, inasmuch as Wausau's PR was filed on March 22, 1991 (and amended April 18, 1991) and the USEPA only later issued its Guidance on Reimbursement Petitions on June 29, 1992, Wausau reserves the right to supplement the PR at such time as USEPA notifies Wausau of any purported deficiency in the PR as described in the recent OSWER guidance.

As stated previously, Wausau submitted the required certification to the Region on February 21, 1991. The Region's response to Wausau's certification and the RAR, as well as commenting upon the PR, was the Region's letter dated June 10, 1991. The new OSWER guidance provides for sixty (60) days for the Region to confirm, or the

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Region is deemed to have waived the issue. Inasmuch as the CERCLA statute only provides a petitioner sixty (60) days to petition the USEPA for reimbursement, the Region should only be entitled to the same amount of time to confirm completion of an Order. To a petitioner such as Wausau the sixty (60) days is jurisdictional; to the Agency, at least in this case with the completion issue being resolved in any event, only the question of compliance with the Order as amended by the ERAP remains. In any event, the USEPA should be estopped from raising any issue concerning completion and compliance, either due to waiver, laches or as a matter of statutory construction which favors the constitutional construction of CERCLA.

### WAUSAU Comments regarding Merits

According to the Agency, Wausau did not meet the "statutory threshold" requirements discussed previously, and "EPA did not evaluate the merits of [Wausau's] petition. The Agency's failure to address the merits is discussed as follows.

USEPA presented Wausau with an Order as later amended by the ERAP that has three dimensions: (1) provisions of the Order with arguably lawful provisions (for which, however, Wausau denies liability, and seeks reimbursement from the Fund in its PR) and which Order as amended by the ERAP Wausau complied with; (2) provisions of the Order where the USEPA arguably treated Wausau arbitrarily and capriciously (as described in the PR filed by Wausau and elsewhere herein or otherwise incorporated herein); and (3) provisions of an Order which arguably extend liability to Wausau with no nexus to Wausau (for example, the requested removal of historic hydrocarbon contamination, non-PCB containing substances, and non-RCRA hazardous wastes).

Wausau submits that if non-PCB contamination, historical soil hydrocarbon contamination, or the inert or drummed non-PCB contaminated materials were contemplated by the Order as amended by the ERAP, or if the Order is interpreted to include any such materials, the Order is illegal, unlawful and unconstitutional. It is fundamental, even under CERCLA's strict liability regime, that there must be a nexus between the liable party and the activity or substance creating the liability. Inasmuch as the USEPA's Order determined that Wausau was a responsible party for PCB contamination associated with the delivery of 700 gallons of PCB-contaminated transformer fluids delivered to the Site by K & D Industrial Services, Inc., the only contaminant that has the necessary nexus would, by definition, have to contain PCBs.

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Congress added a provision to CERCLA for an aggrieved PRP to seek reimbursement from the Superfund in those cases where the USEPA erroneously determined liability or otherwise acted arbitrarily or capriciously. By refusing to examine the merits of Wausau's PR, the Agency is ignoring Wausau's lawful defenses under the law, and negating Wausau's constitutional protection to seek reimbursement from those provisions of an arguably unlawful Order. The Agency simply cannot deny that Wausau substantially complied with the Order as amended by the ERAP and the Agency must address the merits of Wausau's claims for reimbursement of reasonable response costs, including divisible and reasonable response costs, whether based upon Wausau's non-liability or the USEPA's arbitrary and capricious actions, or actions not otherwise in accordance with the law.

## IV. Wausau's Comments to PD's "Discussion" Section

Continuing to respond to the PD's sections as set forth in the PD, the Agency next discussed the substance of the Agency's objections to Wausau's PR. Specifically, the Agency first stated:

### USEPA Statement - Page 7, Paragraph 1

#### "A. Petitioner Did Not Complete the Removal Action Required by the Order

CERCLA expressly requires that a petitioner complete the required action before filing a reimbursement petition. Typically, a respondent, such as Wausau, is to notify the Region when it believes the required action is complete. If the Region informs the respondent that further work is necessary under the Order, then the respondent needs to complete these activities before a petition is ripe for filing. In addition, many orders require that a respondent issue a final report to the appropriate Region for approval when the required action is complete. In this instance, Wausau did not complete the removal action required by the Order. Wausau's filing is not surprising since Wausau on numerous occasions contacted the Region in an attempt to narrow the scope of work required by the Order, despite these attempts, the Region informed Wausau that Wausau must perform all the work contemplated by the Order and the subsequent Work Plan. The Region even provided further guidance to Wausau on the types of remaining activities required by the Order. Still, Wausau did not complete the necessary work, as discussed in detail below."

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## WAUSAU Comment

The most telling comment in the above-quoted PD Statement under the section entitled "IV. Discussion" involves the Agency's suggestion that Wausau failed to complete the actions by failing to prepare a final report. On February 21, 1991 Wausau delivered a multi-volumed final report to the Region in the form of a Response Action Report (RAR), dated February 20, 1991. The USEPA inexcusably excluded the RAR from the AR/PR for this matter. As previously discussed herein, and as further discussed in Wausau's letter to the Agency dated September 13, 1992, it appears that inasmuch as the RAR does not support the Region's conclusion, the Region has inappropriately interpreted the NCP directives that every document that "forms the basis" of the Region's actions be included in the record for judicial review and for public participation, whether or not the item was considered and relied on, or considered and rejected by the Region. In the absence of the final report, i.e. the RAR, it is inconceivable that the Agency's PD was well informed. Every conclusion of completion and compliance with the Order as amended by the ERAP is properly documented in the RAR and contains "verified" data for the Agency's review. Again, and as stated above the PR, as filed with the Agency, also contained a full and complete copy of the RAR and all Appendices.

*It performed a significant portion of the work.*  
It is also interesting to note that the Agency suggests that Wausau repeatedly attempted to narrow the scope of the Order, rather than note that the Order, as written, and the Order as amended by the ERAP, did not contain any description, for example, of hydrocarbon contaminated soils or inert off-Site materials, and that the Region repeatedly tried to expand the scope of the Order beyond the negotiated ERAP, and beyond the factual and legal nexus required to impose liability, much less the identification of a party to a unilateral Order as a potentially responsible party.

The Region's wearisome expansion of the scope of the Order as amended by the ERAP has been addressed from the date of the Order, through the negotiations on the ERAP, through the completion of the removal activities at the Site, and now through the Petition for Reimbursement proceedings. Instead of merely rephrasing the Region's analysis and conclusions, the Agency should instead perform a substantive review of the facts and circumstances of the PR, including not only Wausau's compliance, but also the merits of Wausau's PR.

The USEPA further states under the Discussion sections:

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## USEPA Statement - Page 7, Paragraph 2

### "1. Drums

The Order required that the respondents sample, characterize, and dispose of drums of waste on site. As of June 10, 1991, 62 drums of hazardous substances remained on-site without being properly processed. Many of these drums were improperly stored near each other as the drums contained a potentially explosive mixture of sodium hydroxide and sulfuric acid in the presence of the alumina fiber drums. Even the inert liquids were improperly stored in rusting drums without secondary containment."

## WAUSAU Comment

As set forth above, and as documented in the RAR and the PR, as well as in the PRACC and SPRACC, Wausau sampled and characterized all of the drums that contained waste materials. Wausau disposed of all of the drums and their contents that contained PCB-contaminated materials and several drums containing hazardous waste. Wausau did not sample, characterize or dispose of drums with new or usable commercial product (i.e., non-waste) (see Tables 4 and 6 of the RAR). These activities were completed as required by the Order as amended by the ERAP. As such, the Agency's contention that "62 drums of hazardous substances remained on Site without being properly processed" is in error.

Furthermore, as documented in Tables 4 and 6 of the RAR, of the 62 drums, 38 contained solid materials which posed no threat of release and eight contained water, a non-hazardous substance. Of the remaining 16 drums, two contained sodium hydroxide in the original unopened containers as supplied by the manufacturer. The virgin sulfuric acid was stored in 14 new polypropylene drums which were specifically designed for acid storage and which were obtained and purchased by Wausau expressly for this purpose. Prior to transferring the acid to the newly purchased polypropylene drums, Wausau confirmed the integrity of the drums prior to use, by field testing the drums with the acid.

In addition to the sulfuric acid, the activated alumina and sodium hydroxide were virgin commercial products with commercial value purchased by CIW and were not waste materials generated at the facility. The drummed materials remaining at the Site did not contain detectable levels of PCBs following completion of the removal activities completed by Wausau. As further confirmed by the documents obtained from the ORC's file, the drummed materials left on Site did not contain



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TSCA-regulated substances. Furthermore, the Region's Fund-financed activities, as described in the Region's April 29, 1992 letter, indicated that many of the new materials were returned to the manufacturer as usable product (i.e., not waste). Moreover, and for the record, sodium hydroxide, sulfuric acid and activated alumina do not comprise a potentially explosive mixture, even if commingled.

The Agency next stated in the Discussion section of the PD:

### USEPA Statement - Page 8, Paragraphs 1 and 2

"Wausau provided the following comments [the PRACC dated July 8, 1991] about the drums at the facility: 8 drums contained water; 38 contained solid materials which posed no threat of release; 2 drums contained sodium hydroxide in their original containers; and 14 drums contained sulfuric acid in 14 new polypropylene drums. Wausau also indicated that 85 gallon overpack drums were not used to store materials and none of the smaller 55 gallon drums were rusted or structurally deficient.

In response, the Region again indicated [on August 9, 1991] that Wausau used many old and rusty drums to store the hazardous substances. The poor condition of the drums alone created a threat of release. Wausau did not utilize secondary containment to minimize the threat. Further, Wausau performed a visual inspection of the drums instead of sampling, in an attempt, to confirm the contents of the drums. In fact, the Region indicated that Wausau did not sample the drums or provide any resultant documentation. (The argument made by petitioner that some waste was solid is not persuasive as the Order required the Respondents to respond to "waste." Generally, the physical form of a substance, i.e., liquids or solids, does not determine whether the substance is to be classified as a waste.) Therefore, Wausau did not attempt to process all of the drums of waste as required by the Order. Even the drums processed by Wausau were, in many instances, not appropriately sampled, characterized, and disposed, and thus Wausau created the threat of a new endangerment."

### WAUSAU Comment

As set forth above, and as also documented in the RAR and the PR, and the PRACC and SPRACC, Wausau sampled and characterized all of the drums and their contents that contained waste materials. Wausau disposed of all of the drums and drum contents that contained PCB-contaminated materials and several drums

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containing hazardous wastes. Wausau did not sample, characterize or dispose of drums with "new" or usable product (i.e., non-waste) (see Table 4 of the RAR). As described, these activities were completed as required by the Order as amended by the ERAP. As such, the Agency's contention that "Wausau used many old and rusty drums" or that "Wausau did not attempt to process all of the drums" is in error. As stated above, the integrity of the drums was field-tested and examined on Site. Furthermore, the Region's subsequent activities at the CIW Site after Wausau completed the removal actions required under the Order as amended by the ERAP, indicate that the Region used the very same drums to transport the materials off Site, further corroborating Wausau's contention that the drums were sound.

Again, at the time the materials were packaged for storage all drums were in extremely good condition and their integrity was without question. As further indicated above, Wausau even procured new polypropylene drums specifically designed for the storage of acid. USEPA requires the use of overpack drums only if the primary container is structurally deficient and has a reasonable probability of failure. The 55-gallon drums used by Wausau were all structurally competent and, therefore, secondary containment was not required.

At no time has Wausau attempted to argue that because "some waste was solid" (i.e. based on physical form only) it did not have to be sampled and characterized by Wausau. The Region appears to have misinterpreted a comment presented by Wausau in the SPRACC (page 10, item v) which states that "by visual observation on two occasions, it was confirmed that the contents of the drums contained white crystalline solid, identical in appearance to the material described by the label" which drums, as non-waste material, were not disposed of by Wausau. Moreover, on the basis of information available in the ORC's files, the Region's OSC executed waste stream characterization records certifying (without supporting laboratory data) that the contents were "Original Product". In addition, it is apparent that hazardous waste manifests also signed by the Region's OSC similarly relied on labeling information for purposes of characterizing the container contents. Therefore, neither Wausau's actions in characterizing these materials as new product and relying on labeling information, nor the Region's, were unreasonable.

In regard to the USEPA's statement that "even the drums processed by Wausau were, in many instances, not appropriately sampled, characterized, and disposed" Wausau assumes that the drums to which the Agency are referring are drums of new commercial products and on-Site waste materials homogenized by Wausau and re-drummed in the waste compatibility groups termed as "inert liquids", "inert solids", and "basic solids". Contrary to the Region's assertion, following homogenization of these materials, representative composite samples were

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collected from each of these compatibility groups (See: RAR, Section 4.12.3 and laboratory analytical results presented in Appendix J). In addition a representative composite sample was collected from a fourth homogenized drum compatibility group termed as "flammable liquids". All four composite samples were analyzed for RCRA-characterization parameters, and it was determined that only the drums in the "flammable liquids" compatibility group were RCRA-characteristic hazardous. Subsequently, Wausau disposed of the drums termed as flammable liquids. Additional analyses of samples from the compatibility groups termed as "inert liquids", "inert solids", and "basic solids" confirmed that these materials were not water reactive and thus, not RCRA-hazardous waste. Therefore, the drums were "processed" (homogenized) by Wausau according to the terms of the Order and ERAP and were sampled, characterized, and disposed of as appropriate. Moreover, on the basis of information provided in the ORC's files, the USEPA appeared to rely exclusively on Wausau's "inert liquids" information and similarly confirmed that these materials had no hazardous characteristics. Again, and in regard to the characterization of the new commercial products present on Site, the Region's OSC executed Waste Stream Characterization Records certifying (without supporting laboratory data) that the contents were "Original Product", thereby confirming Wausau's characterization.

The Agency next stated:

### USEPA Statement - Page 8, Paragraph 3; Page 9, Paragraph 1

"Finally, the Region performed the following activities in Order to process the remaining drums left on-site: (1) consolidated 34 drums of inert/basic solids into a 20 cubic yard rolloff box and shipment as waste corrosive solid (a total of 12 tons) to a landfill for pre-treatment and disposal; (2) characterized and disposed of 14 drums (720 gallons) of sulfuric acid as waste corrosive materials; (3) shipped two drums of sodium hydroxide and four drums (.85 tons) of activated alumina to the original chemical manufacturers; and (4) sampled, characterized, and disposed of eight drums (440 gallons) of previously unknown liquids as F002 waste (chlorinated solvents). Further, the Region contained and disposed of all bagged chemicals/materials that remained on site.

X Overall, Wausau did not completely address this threat as required by the Order. Based on this determination alone, OWPE could deny the petition but the following discussion illustrates further the extent of Wausau's unfinished work and its lack of compliance with the Order even for the work it did perform."

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### WAUSAU Comment

In addition to Wausau's characterization of the wastes, as fully documented in the RAR, and on the basis of the waste streams that the Region reported in the April 29, 1992 letter as having been removed from the CIW Site, Wausau notes that none of the wastes described therein were characterized as TSCA-regulated material. Also, since the Region's disposal summary contained in the April 29, 1992 letter does not report the disposition of any soils, the Agency can only conclude that the Region concurred that Wausau's removal action attained the 10 mg/kg total PCB cleanup criterion as set forth in the ERAP. The Region has thus confirmed that Wausau adequately addressed the PCB threat at the CIW Site according to the requirements of the Order as amended by the ERAP. The USEPA's April 29, 1992 disposal summary also confirms that the majority of materials disposed of by USEPA were either non-TSCA oils or oil-contaminated materials and the new commercial products that were transferred to the CIW Site under the USEPA's direction.

The Agency further stated:

### USEPA Statement - Page 9, Paragraph 2 and 3

#### "2. Tanks, Dikes, and All Structures On Site

The Order required the Respondents to decontaminate tanks, dikes, and all structures on site in Order to reduce the threat of release. On June 10, 1991, the Region indicated that Wausau still did not address 9,778 gallons of oil, sludge, and diesel fuel contained within seven tanks and tank trucks. These oil-type substances are hazardous because they are contaminated with up to 19 ppm of polychlorinated biphenyls (PCBs). Further, EPA noted that a pool of oil existed on the ground near the tank truck and the underground storage tank.

In response, Wausau claimed that one of the tanks contains essentially water, and the other tank materials contain PCBs at non-detectable levels. Wausau also claimed the pool of oil was not present when it completed site activities on January 24, 1991, nor during the site inspection on June 24, 1991."

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## WAUSAU Comment

As set forth above, and as documented in Section 4.4.3 and Appendix "O" of the RAR, Wausau disposed of all of the PCB-contaminated oils, totaling 114,772 gallons, as required by the Order as amended by the ERAP. As such, the Agency's contention that "Wausau still did not address 9,778 gallons of oil, sludge, and diesel fuel [which is not a waste] contained within seven tanks and tank trucks" is not true. Wausau sampled and characterized these materials as required by the Order as amended by the ERAP, but was not required to dispose of them because the fluids did not contain PCBs.

As documented by the RAR at Section 5.0, an estimated 9,778 gallons of tanked oils, sludges and water remained on Site following completion of Phase II of the response activities. The UST referred to by the Agency (a boiler blowdown tank) contained essentially only water. Confirmatory sampling and analysis of materials in tanks during Phase II confirmed that remaining materials did not contain PCBs. Table 5 (following page 101, Section 5.0) of the RAR demonstrates that PCBs were not detected in the remaining tanked materials, at detection limits of 6 mg/kg, 1 mg/kg and 19 mg/kg. Due to the matrix being analyzed, these detection limits were the lowest achievable for those specific samples. (Appendix J to the RAR presents laboratory reports for the collected samples.) The Region evidently misunderstood that the detection limits for the samples were 6 mg/kg, 1 mg/kg, and 19 mg/kg due to the matrices being analyzed, as recognized in USEPA's approved methods used for PCB analyses (pursuant to SW-846 Method 8080). Furthermore, all data were submitted to the Region during the course of the work as an attachment to the weekly status reports (Appendix G of the RAR).

The ERAP approved by the Region required, at page 19, that "the contractor will transfer contaminated oils from the storage tanks to approved hazardous waste liquid tankers". The ERAP also required, at page 16, that all materials in the tanks to be tested for PCBs to determine if the materials were contaminated. Wausau was not required under the ERAP to dispose of non-PCB contaminated materials from tanks. Tanked materials which remained at the Site were non-PCB contaminated as documented in the RAR. Further, the ERAP required, at page 20, that "the underground tanks will be emptied of liquids and sediments should sampling and analysis indicate these materials contain PCBs." As noted above, the contents of tank TO18 (the UST referred to by the Region) were confirmed by analysis not to contain PCBs. Therefore, Wausau was not required to remove the contents of this tank pursuant to the ERAP.

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The pool of oil referred to by USEPA in its June 10, 1991 letter was not present when Wausau completed Site activities on January 24, 1991 or during the June 24, 1991 Site inspection. What was observed on June 24, 1991 was some hydrocarbon stained gravel overlain by a small pool of clear rainwater.

The USEPA further stated:

## USEPA Statement - Page 9, Paragraphs 4 and 5; Page 10, Paragraph 1

"OWPE is not persuaded by Wausau's comments, particularly due to the subsequent removal activities performed by the Region at the warehouse tank and the recent test results on tank T018. These results reflected the presence of PCBs at 30 mg/kg (30 ppm). The Region indicated that Wausau should have performed additional PCB tests if the previous results were unclear but Wausau did not perform these tests. Clearly, Wausau's claim of non-detectable levels conflicts with EPA's test results.

OWPE is also concerned with Wausau's claim that it had not detected the pool of oil. The Region has indicated that photographs taken on April 9, 1991, clearly show the pool of oil around the tank truck. Although little oil was present on the surface on June 24, 1991, the soil around the tank was stained indicating migration of the oil into the soil. The Region further noted that Wausau's Response Action Report stated that Tank T024 contained approximately 4200 gallons of oil in February 1991 but only 300 gallons of oil were present in June 24, 1991. Clearly Wausau did not properly respond to the pool of oil, and thus it did not complete this part of the Order."

## WAUSAU Comment

With respect to the "warehouse tank", it is assumed that the Agency is referring to tank T038. According to the information contained in the Region's August 9, 1991 letter, the Agency discovered a tank in the warehouse building which reportedly contained approximately ten gallons of caustic liquid and five gallons of caustic sludge. During the Phase II sampling activities performed at the Site, Wausau did in fact determine that this tank was empty of both liquid and sludge (See: RAR, Sections 3.4.1 and Table 2 therein, reporting Tank T038 as empty). In addition, near the completion of the Phase II removal action, this tank was again investigated, and was confirmed to be empty. The reported presence of any liquid or sludge in the tank during the Region's removal activities may be due to materials transferred to

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this tank by the Region or its contractor(s) after Wausau completed the on-Site work.

With regard to the Region's purported sampling results which "reflected the presence of PCBs at 30 mg/kg", Wausau assumes that the Region is referring to tank T018. As presented in Table 1 in Appendix L of the RAR, Wausau sampled three phases of material in Tank T018 (boiler blowdown tank). Specifically, a thin oil phase, a water phase and a sludge phase were sampled. PCB's were not detected in any of the samples at a detection limit of 4 mg/kg. Though the detection limit reported by Wausau for these samples in Table 5, following page 101 in the RAR, identifies a detection limit of 6 mg/kg for the samples collected from tank T018, in fact, the detection limit was even lower, at 4 mg/kg. At no time were the analytical results "unclear" as the Agency states. Simply stated, no PCBs were detected.

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The Agency's statement that "Wausau should have performed additional PCB tests if the previous results were unclear" indicates that the Region misunderstood the analytical results reported in the RAR. Based upon the administrative record and the information reviewed from the ORC's files, there is no evidence that the Region performed additional analyses which determined the presence of PCBs at a concentration of 30 mg/kg in any sample collected from Tank T018. Wausau concludes that the Region has again misinterpreted analytical detection limits as detected concentration or, alternatively, was reviewing other sample data unrelated to the issue at hand. Without supporting analytical data, the only credible evidence concerning the contents of Tank T018 is found in the RAR, which concludes that the contents of Tank T018 did not contain detectable concentrations of PCBs.

The Agency's statement that Wausau "had not detected a pool of oil" is misplaced. Wausau representatives did not visit the Site between February 11, 1991 and June 24, 1991, and therefore could not have observed the alleged "pool of oil" if in fact it existed. Wausau further comments that the Region's samples S09 and S10 (as found in the ORC's files), and reportedly representative of this material, did not contain detectable levels of PCBs. Moreover, if the Region observed oil stains in this area, this should be considered in light of the spill of approximately 5,000 gallons of oil and water (in essentially the same area) caused by the failure of the Region's contractor's equipment in November 1989.

Upon completion of the Phase II removal activities, the rear compartment of tanker T024 (identified as tank T024 REAR) did, in fact, contain approximately 4,262 gallons of oil. It should be noted that Wausau emptied and decontaminated the front compartment of tanker T024 during the Phase II removal activities. Presumably, the Agency is therefore referring to the rear compartment of

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tanker T024. Furthermore, the Region confirmed in its June 18, 1991 Action Memorandum, as amended on July 9, 1991, that the "aboveground tanks and tank trucks, with a combined total of 9,778 gallons ... remain inside the facility ... ". On the basis of liquids stored in other tanks, this is only possible if 4,262 gallons of oil were present in T024 at the time the Action Memorandum was written. Wausau concludes that the 4,262 gallons of oil were present in tanks T024 upon completion of Wausau's cleanup activities on January 24, 1991.

The stained gravel existing along the south wall of the warehouse on Site, in the vicinity of tanker T024, observed during Wausau's June 24, 1991 Site visit, appeared to be consistent with staining observed in this area during the Phase II removal activities, and did not appear to be the result of leakage from tanker T024. Moreover, when Wausau completed its Phase II activities, tanker T024 was not leaking. Again, the presence of oil stains in this area should be viewed in light of the approximate 5,000-gallon spill (in essentially the same area) caused by equipment contracted by the Region.

Wausau cannot be liable for events that occurred after Wausau completed the removal activities required under the Order as amended by the ERAP. This interpretation of the law implies that Wausau has a continuing responsibility to return to the Site and remediate environmental concerns created after January 24, 1991. That interpretation of the law is well beyond CERCLA's scope of liability.

The Agency also stated:

## **USEPA Statement - Page 10, Paragraph 2 and 3**

"Since Wausau did not perform the required actions, the Region performed numerous actions: (1) disposed of eight drums of hazardous waste oil as a D-listed waste at a RCRA approved incineration facility; (2) disposed of 31 drums (1705 gallons) of waste sludge as waste combustible liquid; and (3) consolidated and decontaminated aqueous liquids. The Region also disposed of 4,500 gallons of hazardous liquids characterized as F002 waste which was comprised of aqueous liquids from the remaining tanks and the decontaminated rinsate generated during the cleanup. Further, the Region removed an underground storage tank (T018) and the tank's contents were consolidated with other tank materials as previously described. The actual tank was decontaminated, cut into pieces, and disposed of as non-hazardous scrap metal. The Region also decontaminated the remaining tanks and performed a verification that no



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residual PCBs remained in the tanks. These tanks also were cut into pieces and sent to a scrap yard as non-hazardous scrap metal.

Clearly, Wausau did not perform the above actions as required under the Order."

## WAUSAU Comment

On the basis of the waste streams reported in the Region's April 29, 1992 letter, Wausau notes of the wastes that were disposed of by the Region, as described therein, none are characterized as TSCA-regulated material. Therefore, based upon the April 29, 1992 letter, Wausau concludes that none of the wastes disposed of by USEPA were PCB waste streams. In addition, since the Region's April 29, 1992 disposal summary does not report the disposal of any soils, Wausau concludes that Wausau's removal action attained the 10 ppm total PCB cleanup criterion under the Order as amended by the ERAP. As such, the Region confirmed that Wausau abated the PCB threat at the CIW Site. The Region's April 29, 1992 disposal summary also confirms that the majority of materials disposed of by the Region were either oils or oil-contaminated materials, or new commercial products that had been transferred to the CIW Site under the Region's direction. None of these materials contained PCBs.

Therefore, the Region's information confirms that Wausau completed the Site removal activities according to the terms of the Order as amended by the ERAP.

Next, the Agency stated:

## USEPA Statement - Page 10, Paragraph 4; Page 11, Paragraphs 1, 2, 3 and 4

### "3. Soil Sampling

Under the Order, Wausau submitted a Work Plan called an "Emergency Response Action Plan" (ERAP). Section 3.3.2 of the Plan called for soil samples to be collected adjacent to and beneath the elevation of each tank in Order to confirm that PCBs had not been released into the surrounding soils. The Region reported [on June 10, 1991] that Wausau had not sampled the soil in one of the three tank areas.

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Wausau claimed that this one tank was not part of the process, and thus it did not contain PCBs. Consequently, Wausau claimed it did not need to take adjacent soil samples.

As noted above, the Region previously indicated this tank (T018) contained PCBs at 30 mg/kg (30 ppm) (see tank discussion above). If Wausau had properly decontaminated the tanks according to the Order, it would have detected the PCB contamination in the tank. Further, the Order and the subsequent ERAP required that Wausau sample the soil around each tank. Wausau did not perform these sampling activities.

The Region performed the following activities relating to soil sampling: it dug test pits and collected soil samples for characterization of the type and extent of soil contamination at the tank (T018). The results from the analysis of the soil samples showed elevated levels of hydrocarbon contamination above the State of Michigan BTEX (Benzene, Toluene, Ethylbenzene and Xylene) standards for soils."

### WAUSAU Comment

As set forth above, and as documented in the RAR, Wausau sampled and characterized all of the wastes on Site, and disposed of PCB-contaminated wastes as required by the Order as amended by the ERAP. As documented by the RAR (at Section 3.4.1), tank T018 was a boiler blowdown tank which did not form part of the facility process stream allegedly contaminated with PCBs by Wausau and did not contain PCB-contaminated material. Samples were collected representing a one and one-half inch thick oil layer, a 46-inch thick layer, and a 1/8 inch thick layer of sludge within the tank. PCBs were not detected in any sample. This tank was, therefore, left in place in accordance with the USEPA-approved ERAP. Because the tank's contents were not contaminated as determined by sampling, underlying and adjacent soil samples were not collected. Moreover, since a review of the ORC's files did not indicate the presence of any detectable PCBs in T018, Wausau concludes that Wausau's actions were in accordance with the ERAP and that the Region's reported discovery of PCBs at 30 mg/kg in T018 may be in error or was, instead, not detected after Wausau completed its removal activities.

The Agency's comments on soil sampling appear to confirm that the on-Site soils met the 10 mg/kg total PCB cleanup criterion established by the ERAP. Moreover, the Region's April 29, 1992 letter similarly confirms that Site soils attained the

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established PCB cleanup criteria. The removal of petroleum hydrocarbon contaminated soils was beyond the scope of the Order as amended by the ERAP as confirmed by the Region's letter of April 29, 1992 and, therefore, Wausau was correct and is correct in its assertion that the Region's request to remediate soils containing petroleum hydrocarbons was not required by the ERAP. In addition, it may be that the hazardous substances detected by the Region (BTXE) are not commonly found in transformer oils; these substances are typically associated with vehicle and equipment maintenance waste oils which are believed to have comprised a large proportion of the CIW waste oil throughput volume.

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The USEPA further stated:

USEPA Statement - Page 11, Paragraphs 5, and 6; Page 12, Paragraphs 1 and 2

## "4. Laboratory Floor

The Order required Respondents to conduct post cleanup sampling. The Region found elevated levels of PCBs at the sinks and tables in the laboratory. When the sinks and tables were removed, Wausau swept the laboratory floor with a broom without performing additional post cleanup sampling. Since PCBs may have been inadvertently tracked into the lab, sampling was particularly important, yet, Wausau did not perform this activity.

Wausau acknowledged that the laboratory floor had been tracked on many times. Wausau took wipe samples during the second phase of the removal action and claimed that these samples would have detected contamination. Wausau further indicated that it removed the sink, swept the floor, and locked the laboratory in order to prevent further access to the lab.

Although Wausau may have taken wipe samples during the removal action, Wausau did not take any cleanup samples after completion of the action as required by the Order. Since the laboratory floor could have been contaminated when the sink and table were removed from the laboratory, the Region decontaminated the floors and walls of the CIW block building as part of the additional work it performed."

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## WAUSAU Comment

As set forth above, and as documented in the RAR at Section 4.8.4, Wausau sampled surfaces in the laboratory most likely to exhibit PCB contamination, as required by the Order as amended by the ERAP. As documented by the RAR, these samples were collected on August 24, 1990 after Wausau had tracked on the floor many times during the cleanup activities. If the floor had been contaminated, it would have been apparent from the wipe samples collected at that time. Following removal of the laboratory sink from the laboratory, the floor was swept, and the laboratory locked and, therefore, inaccessible.

Wausau assumes that the "block building" which the Region reportedly decontaminated is the CIW laboratory building. Wausau is unaware of any analytical data which would justify the Region's decision to decontaminate the floors and walls of the laboratory building. In the Region's letter to Wausau dated August 9, 1991, the Region stated that representatives of the Region "collected wipe samples of worst-case areas from the laboratory floor during the May 1991 inspection conducted by USEPA and TAT", and that the "results revealed that PCBs were present below the quantification limit of 7.5 ug/100 cm<sup>2</sup> in one of the two samples collected." The results of the second sample collected were not reported by the Region. This comment in the Region's August 9, 1991 letter again demonstrates that the Region evidently does not understand the use of data at, or below, limits of detection. The Region's analytical data documents that the sample did not contain PCBs. The data confirms Wausau's conclusion that the laboratory floor was not contaminated with PCBs following Wausau's completion of the cleanup activities. Wausau, therefore, submits that the Region's reported decontamination activities were unnecessary.

Wausau also notes, that all of the Region's wipe sample data presented only in the the ORC's files showed no detectable levels of PCBs, further supporting Wausau's conclusion that the laboratory was not contaminated with PCBs following Wausau's completion of the cleanup activities.

The Agency continued by stating:

## USEPA Statement - Page 12, Paragraphs 3 and 4; Page 13, Paragraph 1

### "5. Post Cleanup Sampling and Hydrocarbon Soil Contamination

The Order required the Respondents to perform post cleanup sampling and excavate contaminated soils for proper disposal.

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Despite these performance requirements, the Region indicated [June 10, 1991] that extensive hydrocarbon contamination still existed in the site soils, including soil contamination at the previous location of the concrete pads and diked areas. The Region also found large oil filters and air purifying cartridges in the excavation area of the contaminated structures. The Region also found twelve containers of used oil ranging from one quart to five gallons at the facility.

Wausau claimed it was not responsible for remediating any soils or bulk solids which contained hydrocarbons unless PCB above the concentration of 10 ppm were also present. Wausau also indicated it was not responsible for managing oils without PCB. Further, Wausau claimed the Order did not require testing or removal of soils contaminated with petroleum (hydrocarbons). Wausau did not sample the exterior walls (walls) of the warehouse and the laboratory because Wausau felt that they were not high contact areas. Wausau claimed that no process areas and no aboveground tanks containing PCBs were located adjacent to the warehouse or the laboratory. Wausau acknowledged that five respirator cartridges and one oil filter were present on June 24, 1991, but did not pose an imminent and substantial endangerment. Finally, Wausau claimed that it was not responsible for the presence of the twelve containers of used oil because local residents and former CIW site users left these containers outside the facility, primarily, after the contractor demobilized from the site."

### WAUSAU Comment

On the basis of the waste streams that the Region reported in the April 29, 1992 letter for the materials the Region reportedly removed from the Site, Wausau notes from the documents found in the ORC's file that none of the wastes were characterized as TSCA-regulated material. Therefore, on the basis of the April 29, 1992 letter, Wausau once again concludes that none of the reported materials transferred off-Site by the Region were PCB-wastes. In addition, since the Region's disposal summary does not report the disposal of any soils, Wausau further concludes that Wausau's removal action attained the 10 ppm total PCB cleanup criterion required by the ERAP. Wausau submits, therefore, that the Region has confirmed that Wausau abated the PCB threat at the CIW Site. Moreover, the Region's April 29, 1992 letter confirmed that the volume of the soil contaminated by petroleum hydrocarbons was "beyond the scope of emergency response." The Region's April 29, 1992 disposal summary also confirms that the majority of

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materials disposed of by the Region were either non-TSCA oils or oil-contaminated materials and the new commercial products that were transferred to the CIW Site under the Region's direction from an off-Site building.

As stated in the ERAP, Wausau was required to collect wipe samples "from areas most likely to exhibit PCB contamination, that is the operational areas on Site". Wausau does not consider the exterior walls of the warehouse building and laboratory to be areas most likely to exhibit PCB contamination. Further, at no time did Wausau detect PCBs at concentrations exceeding the 10 mg/kg cleanup criterion, in soils adjacent to or even near the CIW warehouse building. The soil sample identified as "S-9-5S" on Plan 2 of the RAR was collected from the heavily stained soils existing immediately to the south of the warehouse building, west of the former concrete spill pad overlying tank T035. This sample was a "worst case" sample, representative of the oil stained soils south of the warehouse building. Results of PCB analyses performed on this soil sample indicated that PCBs were not detected, at a detection limit of 1 mg/kg (See: RAR, Appendix J.16). Therefore, oil staining on the Site did not indicate PCB contamination, and accordingly wipe sampling of the southern exterior wall of the warehouse building was not required.

During implementation of the removal action by Wausau, soils were excavated for disposal from the area south of the warehouse building and west of the former concrete spill pad overlying tank T035 only as a precaution, and based on prior analytical results provided by the Region prior to implementation of the removal action by Wausau. Specifically, the analytical data provided by the Region reported PCBs in one soil sample collected to the west of the concrete spill pad at a concentration of 120 mg/kg. In addition, soils were excavated for disposal from the area south of the laboratory building only as a precaution again, based on prior analytical results provided by the Region prior to implementation of the removal action by Wausau. Specifically, analytical data provided by the Region reported PCBs in one soil sample collected south of the laboratory building at a concentration of 24 mg/kg. Interestingly, a sample of heavily oil-stained surficial soil collected by Wausau (sample CRA-T031-ADJAC as presented in Appendix J.16 of the RAR) did not contain detectable concentrations of PCBs. Finally, the exterior walls of the laboratory building were not stained. Based on this information, wipe sampling of the exterior walls of the laboratory building was not warranted. Moreover, and as mentioned above, the Region's own data confirmed that PCBs were not present on Site structures at levels exceeding the established cleanup criterion. Wausau, therefore concludes that the Region's activities in decontaminating the southern exterior wall of the warehouse building were unnecessary.

The Agency also stated:

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## USEPA Statement - Page 13, Paragraph 2

"Despite Wausau's claim that PCBs were not present during the oil recycling process and not located in the above ground tanks, the Region found that PCB levels greater than 10 mg/kg (11 ppm) existed in the soil between the above ground tanks and the exterior walls of the warehouse and the laboratory. The Region commented [August 9, 1991] that these elevated soil readings should have also necessitated wipe sampling of these walls that Wausau did not perform. In addition, the extensive hydrocarbon contamination in the soil created a threat of potential off-site migration."

## WAUSAU Comment

On the basis of the waste streams that the Region reported in the April 29, 1992 letter for the materials reportedly removed from the Site by the Region, Wausau notes that none of the wastes were characterized as TSCA-regulated material. In addition, because the Region's disposal summary does not report the disposal of any soils, Wausau concludes that Wausau's removal actions attained the 10 ppm total PCB cleanup criterion required by the ERAP.

Furthermore, the Region's April 29, 1992 disposal summary confirms that the majority of materials disposed of by the Region were either non-TSCA oils or oil-contaminated materials and new commercial products that were transferred to the CIW Site under the USEPA's direction. And, inasmuch as the wastes reportedly removed from the Site by the Region following Wausau's completed activities did not contain soils, Wausau concludes that the PCB cleanup criterion for soils established by the ERAP was attained.

*Wausau* As set forth in the ERAP, Wausau was required to collect wipe samples "from areas most likely to exhibit PCB contamination, that is the operational areas on Site". Wausau does not consider the exterior walls of the warehouse building and laboratory to be areas most likely to exhibit PCB contamination. Further, at no time did Wausau detect PCBs at concentrations exceeding the 10 mg/kg cleanup criterion, in soils adjacent to or even near the CIW warehouse building. The soil sample identified as "S-9-5S" on Plan 2 of the RAR was collected from the heavily stained soils existing immediately to the south of the warehouse building, west of the former concrete spill pad overlying tank T035. This sample was representative of the oil stained soils south of the warehouse building. Results of PCB analyses performed on this soil sample indicated that PCBs were not detected, at a detection

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limit of 1 mg/kg. This result, therefore, confirmed that oil staining did not indicate PCB contamination, and accordingly wipe sampling of the southern exterior wall of the warehouse building was not required.

During implementation of the removal action by Wausau, soils were excavated for disposal, from the area south of the warehouse building and west of the former concrete spill pad overlying tank T035 only as a precaution and based on prior analytical results provided by the Region prior to implementation of the removal action by Wausau. Specifically, analytical data provided by the Region reported PCBs in one soil sample collected to the west of the concrete spill pad at a concentration of 120 mg/kg. In addition, soils were excavated for disposal from the area south of the laboratory building only as a precaution again based on prior analytical results provided by the Region prior to implementation of the removal action by Wausau. Specifically, analytical data provided by the Region reported PCBs in one soil sample collected south of the laboratory building at a concentration of 24 mg/kg. Interestingly, a sample of heavily oil-stained surficial soil collected by Wausau (sample CRA-T031-ADJAC as presented in Appendix J.16 of the RAR) did not contain PCBs. The exterior walls of the laboratory building were not stained. Based on this information, wipe sampling of the exterior walls of the laboratory building was not warranted. Moreover, and as mentioned above, the Region's own data confirmed that PCBs were not present on Site structures at levels exceeding the established cleanup criterion.

Wausau requested information or reports concerning the reported "elevated levels of PCBs at the sinks and tables in the laboratory as described in the Region's April 29, 1992 correspondence." No information was provided by the Agency or the Region concerning the alleged elevated levels of PCBs at the sinks and tables of the laboratory.

Wausau, therefore, submits that the Region's purported conclusion concerning alleged elevated levels of PCBs at the sinks and tables in the laboratory is an ambiguous and misleading statement, relating to the conditions that may have existed, rather than a conclusion that Wausau failed to complete the required cleanup activities as required by the Order as amended by the ERAP. In other words, the Region's reference to elevated levels does not refer to sampling events after Wausau's cleanup activities were completed, and there is no evidence that the laboratory contained elevated levels of PCBs after Wausau completed its cleanup activities. The USEPA has no information and did not supply any information to Wausau that the sinks and table in the laboratory had elevated levels of PCBs after Wausau completed the cleanup activities. In other words, the only conclusion that



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is available is that Wausau completed that portion of the Order as amended by the ERAP.

Next, the Agency stated:

## USEPA Statement - Page 13, Paragraph 3; Page 14, Paragraphs 1 and 2

"Despite Wausau's claim that local residents placed used oil containers at the facility, the Region indicated [August 9, 1991] that it was not "common knowledge" that these activities occurred. Wausau documented that used oil existed at the site on February 11, 1991, but it did not place these containers in a secure location. The Region noted the containers were still located outside - four months later in June 1991. Wausau may not have placed the twelve containers at the facility but the Order still required that the respondents remediate the facility, including the disposal of the used oil (waste). CERCLA broadly defines the term 'facility' and it does not limit the facility to immediate site boundaries, i.e., it also may include the property outside of the immediate processing area.

Finally, the Order does not limit Wausau's responsibility to PCB contamination. In fact, the Order explicitly identified the volatile compounds, i.e., the hydrocarbons, as a threat. Thus, Wausau's claims that it need not remediate soils contaminated with hydrocarbons is incorrect. Since (used) oils are a form of hydrocarbon, regardless of whether they are contaminated with PCBs, Wausau should have responded to the used oil as these oils often contain elevated levels of hazardous substances."

- 12/2/91  
in the  
Order

## WAUSAU Comment

As set forth above, and as documented in the RAR, Wausau sampled and characterized all of the waste material at the Site and disposed of PCB-contaminated items as required by the Order as amended by the ERAP. As further documented by the SPRACC, the Region and its contractor were, in fact, aware (even prior to commencement of the Phase II removal activities) that from time to time containers of waste oil were left outside the CIW facility after CIW ceased operations. Although the small containers identified outside of the facility on February 11, 1991 could have been placed inside a Site building, neither the Order nor the ERAP envisioned the ongoing acceptance of waste oils after the facility ceased operations. Moreover, Wausau had no authority or basis to receive waste oil stocks at the facility. Furthermore, the term "facility" as further defined in the

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AR/ERP's Action Memorandum limits the CIW Site definition to an area within the fence.

Also of note is that at no time during the four month period identified by the USEPA did the Region or its contractor place the small containers located outside of the fenced perimeter inside a Site building or transport them to an approved disposal or recycling facility. Wausau finds this significant since the AR/PR and the ORC's files indicate that the Agency and/or its contractor(s) were present at the Site in April, May and June of 1991 and, one can infer, that the presence of these containers was not viewed by the Region as a threat to public health or the environment.

The Agency further stated:

## USEPA Statement - Page 14, Paragraph 3

"As indicated above, the Region sampled the soil for hydrocarbon contamination. In addition, the Region removed concrete footings from the former tank farm containment structure along with a stockpile of other concrete footings. EPA regraded the soil on the site to an acceptable slope in Order to control erosion. Finally, the Region placed all personal protective clothing and miscellaneous debris generated during the cleanup into 43 fiber drums and disposed of them as F002 waste."

## WAUSAU Comment

Wausau requested information or reports concerning the removal of "concrete footings from the former tank farm" structure. The ORC's file may have supplied some unverified and unsupported analytical reports, however no narrative reports were provided concerning the activities that would support or verify the Agency's activities in removing those footings as consistent with the Order, or with the ERAP or NCP. Furthermore, no information supports the conclusion that the removal of concrete footings evidences that Wausau did not comply with the Order as amended by the ERAP.

The grades existing at completion of Wausau's removal activities would not have contributed to erosion of soil materials. The former operational area of the Site where excavation activities were performed by Wausau was essentially flat. Presumably, if the Region were concerned about erosion they would have established a vegetative cover over the area.

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*do we have R5  
waste  
manifests*

Wausau requested information or reports concerning the disposal of "personal protective clothing and miscellaneous debris" as F002 waste. Outside of waste manifests indicating USEPA's waste characterization, no information was provided by the Agency or the Region concerning such disposal. Wausau, therefore, submits that the Region's disposal activities were unnecessary, not in furtherance of the Order as amended by the ERAP and inconsistent with the NCP, and only necessitated, if at all, by the Region's unnecessary decontamination activities (including the use of solvents and diesel fuel customarily used in decontamination activities) referred to in the Agency's April 29, 1992 letter.

## USEPA Statement - Page 14, Paragraphs 4 and 5; Page 15, Paragraphs 1, 2 and 3

### **"B. The Petitioner Did Not Comply With The Order**

CERCLA section 106(b)(2)(A) also requires that a petitioner comply with the terms of an Order before petitioning the Agency for reimbursement. Compliance, in part, requires that a petitioner correctly perform the required action within the appropriate time-frame. As indicated above, Wausau did not complete the required action. In addition, it did not comply with the Order because many of the actions were incorrectly or partially performed. Further, Wausau did not even perform the actions it did within the allocated time-frame.

The original Order required the Respondents to perform the removal action within twenty-five days of the Region's approval of the Work Plan. The Region extended the period for completion of the work to 120 days. Nonetheless, the Region approved a work plan requiring completion of the action, phases I and II, within 180 days. Under this schedule, the Region provided respondents, including Wausau, a total of two months to complete phase one and four months to complete phase two. Respondents started working on phase one, site stabilization, on February 28, 1990, but did not complete this phase until May 30, 1990, approximately 30 days after the allotted time period. Respondents commenced phase two, actual site remediation, on May 30, 1990, but did not complete this phase until January 24, 1991, approximately 121 days after the allotted time period for this phase.

Despite the time overrun, Wausau claimed that phase two activities started on March 19, 1990, not two months later. In addition, Wausau

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also claimed that it orally informed the Region that capacity was limited for incineration of PCB-oils and requested regional assistance. Consequently, Wausau contended that any delay was due to conditions beyond its control.

Overall, the Region provided adequate time for the respondents, including Wausau, to complete the removal action. The Region required the action to be complete within 180 days of the approved Work Plan; yet, Wausau stopped work on the 331st day, 151 days after the 180 day period allocated in the Work Plan. Clearly, the work, which was completed, was not completed within a reasonable time period based on the approved schedule. Further, the Order required the respondents to seek time extensions in writing from the Region. The Region did not receive either a verbal or a written request for a time extension. On October 25, 1991, EPA finally completed all remaining actions which Wausau failed to perform. Therefore, Wausau did not comply with the Order."

### WAUSAU Comment

As set forth above, and as stated in the PRACC, if not for the lack of availability of PCB incineration capacity the project would have been completed (less two drums) within the agreed time frames. Following the Region's approval of the ERAP, mobilization for Phase II activities began on March 19, 1990 - fully 42 days in advance of the ERAP-required start date of May 1, 1992. A remedial contractor was selected and on Site by May 30, 1990, approximately one week ahead of schedule. The Region was continually apprised of all on-Site activities through weekly progress reports and was, therefore, well aware of the time frame for completion of the project. To this end, Table 1 documents the number of times oil incineration issues were communicated to the USEPA. For example, Wausau orally notified the Region in June 1990 that the capacity for PCB-oil incineration was extremely limited and that, due to conditions beyond Wausau's control, the progress of work would be delayed. As such, and although a written request for a time extension was not formally presented to the Region, the written weekly progress reports adequately informed the Region that work required by the Order as amended by the ERAP would continue to be conducted after the time period set out by the ERAP. Moreover, Wausau was never advised by the Region to cease on-Site activities due to the slippage of schedule nor was Wausau informed by the Region that the Region objected to, or disapproved of, any of the time constraints reported by the weekly progress reports.

*Way this request made in writing when was the request made*

TABLE 1

**RECAPITULATION OF "WEEKLY PROGRESS REPORTS"  
RE: INCINERATION ACTIVITIES**

<i>Report No.</i>	<i>Date</i>	<i>Description</i>
1	5/2 - 9/90	-Ongoing discussion with CWM re: waste oil incineration
2	5/10 - 17/90	-Ongoing discussion with CWM re: waste oil incineration -Submitted on-site waste characterization to CWM for incinerator approval
3	5/18 - 25/90	-No incineration activity in report
4	5/26/90 - 6/3/90	-No incineration activity in report
5	6/4 - 10/90	-No incineration activity in report
6	6/11 - 17/90	-First load (5,000 gal) of PCB removed on 6/12 for incineration at CWM Chicago
7	6/18 - 24/90	-Three loads (5,000 gal each) of PCB oil removed for incineration at CWM Chicago -LTR to USEPA dated 6/20/90 requisition help in obtaining additional capacity at CWM's incinerator for disposal of PCB-contaminated oils from site
8	6/25 - 7/1/90	-Oil transported (quantity in gallon listed) to CWM and Rollins incinerators
9	7/2 - 8/90	-Oil transported (quantity in gallon listed) to CWM and Rollins incinerators
10	7/9 - 15/90	-Oil transported (quantity in gallon listed) to CWM and Rollins incinerators
11	7/16 - 22/90	-7/17/90 5,257 gal of oil transported to Rollins incinerator
12	7/23 - 29/90	-Oil transported (quantity in gallons listed) to Rollins incinerator
13	7/30 - 8/5/90	-8/1/90 4,756 gal of oil transported to CWM incinerator

TABLE 1

**RECAPITULATION OF "WEEKLY PROGRESS REPORTS"  
RE: INCINERATION ACTIVITIES**

<i>Report No.</i>	<i>Date</i>	<i>Description</i>
14	8/6 - 8/12/90	-No incineration activity in report
15	8/13 - 19/90	-8/17/90 4,993 gal of oil transported to Rollins incinerator
16	8/20 - 26/90	-No oil removed from site during period
17	8/27 - 9/2/90	-8/31/90 2,552 gal of oil transported to Rollins incinerator
18	9/3 - 9/90	-No incinerator activity in report
19	9/10 - 16/90	-PCB contaminated oil removal completed
20	9/17 - 23/90	-Next reporting period should have incineration disposal activity
21	9/24 - 30/90	-CWM removes drums for incineration at Trade Waste, Sauget, Illinois
22	10/1 - 7/90	-CWM removes drums for incineration at Trade Waste, Sauget, Illinois
23	10/8 - 14/90	-No incineration activity in report
24	10/15 - 21/90	-No incineration activity in report
25	10/22 - 11/18/90	-Removal of PCB oil for incineration scheduled for next week
26	10/29 - 11/18/90	-11/13/90 1,350 gal of PCB oil transported to CWM incinerator, Chicago, Illinois
27	11/19 - 12/2/90	-Disposal at CWM incinerator, Chicago and Rollins incinerator in Deer Park, Texas
28	12/3 - 16/90	-Disposal at CWM incinerator, Chicago and Rollins incinerator in Deer Park, Texas
29	12/17/90 - 1/24/91	-Removal of flammable liquids on 1/24/91 for incineration at CWM Chicago

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Furthermore, Wausau requested, by letter dated June 20, 1990, the Region's assistance in obtaining additional incineration capacity to expedite and compress the project schedule. (A copy of the June 20, 1990 letter is attached hereto and incorporated herein by reference as Exhibit 31.) A formal response was never received from the Region. The concern with the potential for schedule slippage due to lack of incineration capacity (thus adding approximately sixty (60) days to the on-Site activities) was well known to the Region and was a subject of discussions between the Region and Wausau even during the ERAP negotiations. In fact, if not for the removal and disposal of the tank contents and tanks, all on-Site removal activities (except for removal of two drums) would have been completed within the time period originally set-out by the ERAP, or on or about August 31, 1991. Since the completion of most Site work hinged on removal of the tank contents, this activity was rate-limiting. Thus, but for conditions beyond Wausau's control, on-Site removal and abatement activities would have been completed within the otherwise adequate time frames established by the ERAP.

Wausau submits that that the Region's comments about timing are very technical. The Region does not claim any endangerment to the environment as a result of the schedule slippage primarily due to limited incineration capacity. There is no suggestion or hint the Wausau was dilatory or that Wausau was not pursuing the removal actions required by the Order as amended by the ERAP diligently and in good faith, only that Wausau had not formally requested an extension of time from the Region. Wausau had had various conversations with the Region's on-Site personnel and concluded that a formal extension was not necessary. In any event, except for incineration capacity, a factor beyond Wausau's control and known to the Region, Wausau completed each and every activity required within the Order's and ERAP's time frames, including the submission of the final report, i.e. the RAR.

### Administrative Hearing Request and Conclusion

According to the Guidance on Reimbursement Petitions, an "oral hearing" is available to the parties to a reimbursement petition to provide for an opportunity to test the credibility of evidence and witnesses in areas of dispute. Inasmuch as they are several contentious issues in this matter concerning completion and compliance with the Order as amended by the ERAP, and the merits of Wausau's PR, Wausau respectfully requests a hearing and oral arguments with the Agency before the FD is issued by the Agency.

*In our discussion  
Agmt. Decision*

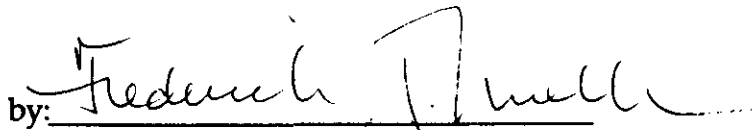
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Finally, and in conclusion, Wausau respectfully requests the Agency to issue a Final Decision granting Employers Insurance of Wausau's Petition for Reimbursement, as amended, and further awarding Wausau reimbursement from the Hazardous Substance Superfund for the \$2,226,152.70 in reasonable response costs incurred by Wausau in complying with the Unilateral Administrative Order, Docket No. V-W-89-C-039, issued on November 29, 1990 and amended on February 1, 1990 and February 26, 1990, and as further amended by the Emergency Response Action Plan, plus interest, fees, costs and other expenses.

Respectfully Submitted,

EMPLOYERS INSURANCE OF WAUSAU

by: 

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cc: Brett L. Warning/USEPA (Via telecopy without Exhibits and via Federal Express with Exhibits)